United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

362

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 23,949

UNITED STATES OF AMERICA, APPELLEE

v.

ALPHONSO CAIN, APPELLANT

Appeal from the United
States District Court for
the District of Columbia

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(1) Did the trial Court err in denying appellants motion for a mistrial?

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BRIEF FOR APPELLANT

ISSUES PRESENTED

(1) Did the trial Court err in denying appellants motion for a mistrial?

(2) Did the trial Court err in denying appellant's motion to suppress the in-court identification because:

a) there was strong evidence that the Government failed to produce all the photographs the Court had earlier ordered to be produced, and

b) there was no attorney present to protect the rights of appellant when his picture was being shown to Mr. Best?

(3) Did the trial Court err in denying appellant's motion for judgment of acquittal as to the kidnapping counts?

This case has not previously been before this Court.

REFERENCES TO RULINGS

1) On July 24, 1969, the District Court ordered the production, at the time of the hearing of the motion to suppress identification testimony, of all photographs of possible suspects shown by police to any witness in connection with this case.

2) On November 3, 1969, the trial Court denied appellant's motion to suppress the in-court identification by Mr. Best. (Tr. 34)

3) On November 4, 1969, the trial Court denied appellant's motion for a mistrial. (Tr. 87)

4) On November 4, 1969, the trial Court denied appellant's motion for judgement of acquittal as to the kidnapping counts. (Tr. 117)

STATEMENT OF THE CASE

On November 3 and 4, 1969, the appellant was tried by a jury before Judge John LeWis Smith, Jr. on a seven count indictment charging him with robbery (22 D.C. Code, Section 2901), two counts of assault with a dangerous weapon (22 D.C. Code, Section 502), two counts of kidnapping (18 U.S. Code, Section 1201), interstate transportation of stolen motor vehicle (18 U.S. Code, Section 2312), and unauthorized use of a motor vehicle (22 D.C. Code, Section 2204). The jury found him guilty on all seven counts. On January 16, 1970, Judge Smith sentenced appellant to 4 to 12 years for robbery, 3 to 10 years for each of the two counts of assault with a dangerous weapon, 4 to 12 years for each of the two counts of kidnapping, 1 to 3 years for interstate transportation of a stolen motor vehicle, and 1 to 3 years for unauthorized use of a motor vehicle; all sentences to run concurrently by the count.

He now appeals from the trial court's denial of his motions for a mistrial, to suppress the in-court identification, and to direct a judgment of acquittal on the kidnapping counts.

The evidence at trial showed the following. At approximately 11:15 AM on December 31, 1968, Mr. Best and Mr. Lorick were in the process of delivering whiskey to different stores on behalf of the Globe Distributing Company. When they reached R Street and New Jersey Ave N.W., Washington, D.C., two men opened the doors to the truck and, with guns in their hands, took control of the truck. They drove it to the Coliseum, where the two highjackers placed Mr. Best and Mr. Lorick in the enclosed,back portion of the truck. The truck was then driven for approximately another 45 minutes and again came to a stop. (Tr. 37-43, 60-61)

At that point the rear doors of the truck were opened and a similarly constructed U-Haul rental truck was being backed up to it so that the trucks were touching back to back. (Tr. 43, 62). At that point a third man joined the two highjackers and compelling Mr. Best and Mr. Lorick to assist them they moved the contents of the highjacked truck to the U-Haul truck. (Tr. 44-46, 62-63). Mr. Best and Mr. Lorick were once again closed in the rear of the now empty truck and driven away from the place of transfer to Maryland

where they were released with the truck. (Tr. 47-48, 63).

Appellant stipulated to the fact that he had rented the U-Haul truck involved. (Tr. 80-81). There was testimony from the leasing agent that the truck had been rented at about noon of the day in question. (Tr. 76). There was also testimony from Officer Satterfield that Appellant had reported the U-Haul truck to have been stolen ~~on that day~~ on that day between 5PM and 5 PM on January 2, 1969. This report was made January 2, 1969. (Tr. 102-105). Detective Cain testified that on one occasion following the occurrence he had left a message with appellant's mother for appellant to come to the police station, and that appellant complied with the request, and in that and all other respects he cooperated fully with the police. (Tr. 99-101).

The evidence at the hearing of appellant's motion to suppress identification testimony showed that on or about January 1, 1969, Detective Cain showed some photographs to Mr. Best who stated that appellant's picture strongly resembled the appearance of the third man who joined the two highjackers at the time the liquor was transferred to the U-Haul truck. (Tr.6-7, 26-27,29) Mr. Best testified that he was shown 20 to 25 pictures. (Tr. 8) Detective Cain testified that he showed Mr. Best only the 7 pictures which

were made exhibits at the hearing. (Tr. 26-29). Mr. Lorick did not identify appellant's picture as representing on of the perpetrators. (Tr. 22-24)

At trial, Mr. Best condradicted himself and stated that he first identified appellant's picture on the day of the occurrence from books of photographs shown to him at the pdice station. (Tr. 51-52, 55-56).

STATUTE OF PARTICULAR INTEREST

Title 18, United States Code, Section 1201 (a) states:

> Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward or otherwise, except in the case of a minor, by a parent thereof, shall be punished 1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or 2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

SUMMARY OF ARGUMENT

I. When the hearing to suppress identification testimony is directed to the time and place the Government witnesses, including Mr. Best, say Mr. Best first picked out appellant's

photograph, and later at trial, following his in-court identification of the appellant, Mr. Best states that he had been shown appellant's picture on a previous occasion, the trial court should have granted appellant's motion for a mistrial. This would have provided an opportunity to hold another hearing directed to the circumstances surrounding the initial identification.

II. (a) Since there was strong evidence that the Government failed to comply with District Court's order to produce at the identification hearing all photographs shown to Mr. Best, the trial court erred in denying appellant's motion to suppress the in-court identification.

(b) Appellant was entitled to have counsel present to protect his rights when Mr. Best was shown his photograph because a photographic display is more subject to prejudicial distortion than a line-up. Thus, it was error for the trial court to deny appellant's motion to suppress the in-court identification by Mr. Best when appellant was not protected by presence of counsel.

III. Since the movement of Mr. Best and Mr. Lorick by the highjackers was merely incidental to their obvious sole purpose of robbery, the trial Court erred in denying appellant's motion

for judgment of acquittal. That denial unfairly subjected the appellant to a possible lifetime of imprisonment while the maximum sentence for robbery, the real thrust of the crime, is 15 years imprisonment.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR MISTRIAL

(Pertinent parts of record:
Tr. 1-34, 44-45, 55-56, 86-87, 99-101, 51-53)

On May 22, 1969, appellant filed with the trial court a motion to suppress his pre-trial identification as well as any in-court identification of him as one of the perpetrators of the offenses for which he had been charged. This motion was heard just prior to trial.(1) At that hearing, Mr. Best, the government's only identification witness, testified that after the occurrence on December 31, 1968, he was shown photographs on two occasions: once at his home on or about January 1, 1969, and again a week later at his place of employment.(2) He stated that he picked the appellant's photograph as being one of the robbers when the pictures were shown to him at his home.(3) Detective Cain of the Robbery Squad confirmed that he showed the pictures to Mr. Best on the two above-stated occasions and that he picked out appellant at the first showing.(4) Thus, the basic thrust of the hearing concerned

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(1) Tr. 1-34

(2) Tr. 7-11 & 15-17

(3) Tr. 7-11

(4) Tr. 26-28

the circumstances surrounding Mr. Best's identification of appellant's photograph on January 1, 1970.(5) Ultimately, the trial court denied appellant's motion.(6)

At trial, Mr. Best directly contradicted himself on this essential point of fact by stating that he was first shown appellant's photograph at the police station on the day of the occurrence, and that it was at that time that he identified it as a picture of one of the robbers.(7)

This unexpected change in testimony rendered the hearing on the motion to suppress identification entirely worthless as that hearing did not explore at all the circumstances surrounding Mr. Best's identification of appellant's photograph at the station house. This ordinarily would have been cause for a rehearing. See Rouse v. United States.(8) However, in this case, Mr. Best had already made his in-court identification of the appellant,(9)

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(5) For example, all of the photographs produced at the hearing were those which were shown to Mr. Best on January 1, 1970

(6) Tr. 34

(7) Tr. 51-53, 55-56. Detective Cain did not testify as to this showing, probably because he did not get into the case until January 1, 1969. Tr. 24

(8) 123 U.S. App. D.C. 348, 359 F. 2d 1014 (1966)

(9) Tr. 44-45

and the harm that such a hearing was designed to prevent had already occurred.

The appellant's only effective recourse was a motion for a mistrial which, if granted, would have afforded the opportunity for another hearing. This motion was made and denied.(10) It is submitted that in denying appellant's motion the trial Court violated appellant's Fifth Amendment right to due process protected by Stovall v. Denno,(11) and Simmons v. United States.(12)

It is further submitted that the trial Court's finding that there was an independent source for Mr. Best's identification(13) was also erroneous. The lack of knowledge concerning the station house identification strongly detracted from one's ability to determine the authenticity of any alleged independent source. Also, the Court's finding that there was an independent source was based on Mr. Best's own, self-serving statements to the effect that he observed appellant at the time of the offense for a substantial period of time, that he had a clear view of his face, and was able

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(10) Tr. 86-87

(11) 388 U.S. 293 (1967)

(12) 390 U.S. 377 (1968)

(13) Tr. 34

to identify him in court from his observation at the time of the occurrence.(14)

The evidence countering Mr. Best's statements was ample. The only opportunity for Mr. Best to see the perpetrator he said was the appellant was while they were in the two trucks which were back to back and touching each other when and where there could not possibly have been the best of lighting conditions.(15) Mr. Lorick, another government witness who admittedly had every opportunity to see the perpetrator that Mr. Best had, was totally unable to identify the appellant,(16) indicating that the circumstances for an accurate identification were not favorable. Also, Detective Cain testified that when Mr. Best identified appellant's photograph he did not say, "That's the man", or language similar thereto. Rather, he said only that appellant's photograph "strongly resembled" the man.(17) Finally, in giving

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(14) Ibid, Tr. 20-21

(15) Tr. 13-14

(16) Tr. 14, 16, 23-24

(17) Tr. 27-29

the police the "best description he could" following the occurrence, Mr. Best described the man he thought to be the appellant as 5'8" or 5'9" tall, weighting 145 or 150 pounds and having a thin mustache, and nothing more.(18) That was the best description he could offer. He was unable to describe any of the man's clothing, much less his facial features.(19) In fact, at the time of the occurrence appellant was 6 feet tall and weighed about 170 to 178 pounds.(20)

Thus, notwithstanding Mr. Best's claims of precision, one can not reasonably say that the Government met its burden of proving an independent source by "clear and convincing evidence", the test set by the Supreme Court in United States v. Wade.(21)

Because there was no basis for finding an independent source for the identification, appellant's motion for a mistrial and a new exclusionary hearing should have been granted.

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(18) Tr. 17-20

(19) Tr. 17-18

(20) Tr. 22

The police apparently recognized the weakness of the identification themselves, as evidenced by their delay in arresting appellant until January 17, 1969 although he was accessible to the police at most anytime. Tr. 99-101

(21) 388 U.S. 218, 240 (1967)

II. THE TRIAL COURT ERRED IN REFUSING TO SUPRESS THE IN COURT IDENTIFICATION OF APPELLANT.

(Pertinent parts of record:
Order of District Court dated July 24,1969,
Tr. 8-10, 26-31, 34, 51-52, 56, 114-115,117,118,121,171)

A. There was Strong Evidence that the Government Failed to Produce all the Photographs Shown to Mr. Best for Purposes of Identification.

On May 26, 1969, Appellant filed a motion requesting the production at the time of the hearing of the motion to suppress identification testimony of photographs shown to witnesses for the purpose of identifying the perpetrators. This motion was granted by Judge Gesell of the District Court on July 24, 1969.(22) At the time of the hearing, the Government produced the seven photographs which were allegedly shown to Mr. Best at his home on January 1, 1970.(23) However, Mr. Best testified that on that occasion he was shown in the neighborgood of 20 to 25 photographs,(24) that he had looked through about 12 or 13 before

(22) Cf. Simmons v. United States, 390 U.S. 377 (1968)

(23) Tr. 9, 26-28

(24) Tr. 8

seeing appellant's picture,(25) that he had been looking at the photographs for about 5 minutes before coming to the photograph of the appellant,(26) and that he did not recall being shown 2 of the photographs produced at the hearing.(27) Surely, one who has studied photographs for identification purposes would have a high degree of recall as to the approximate number he looked at.

Furthermore, during the trial Mr. Best testified that he was shown books of photographs, including one of the appellant, on the day of the occurrence at police headquarters.(28) None of these photographs were produced at the hearing.

Under these circumstances, it was erroneous for the trial court to deny appellant's motion to suppress the in-court identification of appellant. Defense counsel so argued,(29) but was overruled.(30) Also, for the reasons stated in the latter half

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(25) Tr. 8

(26) Tr. 8-9

(27) Tr. 9-10

(28) Tr. 51-52, 56

(29) Tr. 29-30

(30) Tr. 34

of Part I of this argument, it can not reasonably be argued that the error was harmless due to the existence of an independent source of identification.

B. Appellant Was Entitled to Have Counsel Protect His Rights When Mr. Best Identified Him By Photograph.

In United States v. Wade[31] the Supreme Court held that an accused was entitled to the presence of counsel at a post-indictment line-up. Some of the language in Wade implies that a suspect has a right to counsel at any pretrial confrontation regardless of the circumstances,[32] although to avoid prejudicial delay substitute counsel might suffice.[33] In Russell v. United States,[34] this Court, pursuant to that language, considered whether an accused was entitled to counsel at an identification

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(31) 388 U.S. 218 (1967)

(32) United States v. Wade, supra note 31 at 227. Also see Russell v. United States, 133 U.S. App. D.C. 77, 79, 408 F. 2d 1280, 1282 (1969)

(33) United States v. Wade, supra, n. 31 at 237

(34) 133 U.S. App. D.C. 77, 408 F. 2d 1280 (1969)

occurring shortly after the crime. Recognizing that the question was "dificult", (35) this Court concluded "with some hesitation"(36) that counsel was not required, but clearly limited its holding to "on-the-scene identifications which occur within minutes of the witnessed crime."(37)

It was held in Thompson v. State(38) that since identification by photographic display is not only tantamount to a physical line-up but also is more subject to prejudicial distortion than a line-up, a suspect whose picture is being shown to a witness for identification purposes is just as entitled to have counsel present at that showing to protect his Constitutional rights as at a line-up.(39) In this case, the photographic identification did not take place within minutes of the crime; nor was there any problem of retaining innocent suspects which concerned this Court in Russell. Thus, from Wade, Thompson, and Russell the logical conclusion to be

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(35) Id., at 79, 408 F. 2d at 1282

(36) Id., at 81, 408 F. 2d at 1284

(37) Id., at 81 (n. 20), 408 F. 2d at 1284 (n. 20)

(38) _____Nev._____, 451 P. 2d 704, cert. denied 396 U.S. 893 (1969)

(39) Id., at 706

drawn is that appellant was entitled to have the protection of an attorney at the time and place his picture was being shown to Mr. Best.

In United States v. Kirby,(40) this Court ruled that the Thompson case was inapplicable because 1) in Kirby the police and prosecution acted responsibly in preserving and showing to defense counsel the photographs shown to the witness and 2) defense counsel did not lodge any objection to the admission of the photographic identification.(41) In this case, however, there is an abundance of evidence to the effect that all of the photographs shown to Mr. Best at his home were not shown to defense counsel, and that none of the photographs Mr. Best claims to have been shown at the police station, except that of appellant, were shown to defense counsel.(42) Also, defense counsel in this case did object to the lack of production of all of the photographs which prevented a full hearing

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(40) _____U.S. App. D.C._____,_____ F. 2d_____, No. 23, 106; decided April 24, 1970

(41) Id., Slip opinion, pp. 4-5

(42) See Section A of Part II of this brief. This is precisely the type of confusion as to the circumstances surrounding an identification that the Supreme Court had hoped to prevent in requiring presence of counsel under United States v. Wade, 388 U.S. 218 (1967)

as to the existence of suggestiveness. He also objected to lack of counsel at the time of the photographic identification.(43) Thus, this case is signigicantly distinguishable from Kirby.

Again, the error committed cannot be said to be harmless because of an independent source for the in-court identification for the reasons stated in the latter portion of Part I of this argument.

III. THE TRIAL COURT ERRED IN DENYING APPELLANTS MOTION FOR JUDGMENT OF AQUITTAL AS TO THE KIDNAPPING COUNTS

(Pertinent parts of record: Tr. 114-115, 117, 118, 121, 171, 37-44, 46-48, 60-63, 96)

At the end of the Government's case in chief, appellant moved for judgment of acquittal as to the two kidnapping counts.(44) The motion was denied.(45) The motion was renewed and again denied

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(43) Tr. 29-31

Also, when Detective Cain showed the photographs to Mr. Best, he was not trying to "narrow the field of suspects"; see United States v. Hamilton, _____U.S. App. D.C._____, 420 F. 2d ~~U.S.~~ 1292, 1294, n. 6; for he had already found out that appellant was the person who rented the truck involved in the robbery, and he showed the pictures to Mr. Best based on this information. Tr. 26, 96

(44) Tr. 114-115

(45) Tr. 117

at the end of appellant's case,(46) and an objection to the instruction of kidnapping was made and overruled both prior to and following the Court's charge to the jury.(47)

The Federal Kidnapping Act(48) was addressed to the rash of kidnappings which occurred in the early 1930's culminating in the famous Lindbergh case. The perpetrators of these crimes, knowing that law enforcement authorities in the jurisdiction of the abduction were impotent in another jurisdiction, would merely whisk the captive across a state line and thereby acquire a relative measure of safety. This Act was designed to thwart such activity, and, partly because of the public's alarm, was given very broad language so as to meet most any contingency.(49)

In recent years, scholars and some courts have recognized the prosecutorial abuse afforded by the Act and similarly constructed state statutes.(50) From this recognition, there is clearly emerging

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(46) Tr. 118

(47) Tr. 121, 171

(48) 18 U.S.C. 1201

(49) Chatwin v. United States, 326 U.S. 455, 462-463 (1946)

(50) See People v. Daniels,80 Cal. Rptr. 897, 459 P.2d 225 and the authorities cited therein for a thorough review of the problem.
One of the worst abuses is the use of a kidnapping charge to secure a death sentence or life imprisonment for behavior that basically amounts to robbery or rape in jurisdictions where these offenses are not so punishable.

an enlightened approach to such statutes to the effect that a technical kidnapping which is incidental to another felony, such as robbery or rape, is not indictable.(51) In People v. Levy,(52) the New York Court of Appeals rejected its former interpretation of the State's kidnapping statute and reversed the trial Court's convictions of the defendants for kidnapping. In that case, the defendants took control of the victims' car, drove them around for about 20 minutes, and robbed them in the process. The Court overturned the convictions for kidnapping on the ground that the thrust of the crime was robbery and the technical kidnapping offense was merely incidental thereto. The Court noted that the definition of kidnapping could literally overrun several other crimes including robbery, rape, and assault, and that it was unlikely that the legislature intended the confinement or asportation incidental to those offenses to be treated as a separate crime of kidnapping.(53)

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(51) Even as early as 1946, the Supreme Court took precautions to see that the application of the Federal Act be limited to those occurrences which were in the nature of true kidnapping. Chatwin v. United States, supra, n. 49

(52) 15 N.Y. 2d 159, 256 N.Y.S. 2d 793, 204 N.E. 2d 842 (1965)

(53) Id., 204 N.E. 2d at 844

In People v. Lombardi,(54) the New York Court of Appeals utilized the Levy rule in reversing the trial court's conviction of the defendant for kidnapping. In that case, the defendant induced three females to take drugs which impaired their will and drove them from Manhattan to Queens where he sexually assaulted them. The Court recognized the technical kidnapping, but stated,

> ...the direction of the criminal law has been to limit the scope of the kidnapping statute, with its substantially more severe penal consequences, to true kidnapping situations and not to apply it to crimes which are essentially robbery, rape, or assault and in which some confinement or asportation occurs as a subsidiary incident. (Emphasis added)(55)

Just last fall, the Supreme Court of California in Peoples v. Daniels(56) rejected its former interpretation of its statute. In that case, the Court provided a most illuminating opinion in which it followed the common sense construction and application of kidnapping statutes adopted by New York.

In the case at hand, the perpetrators of the robbery were obviously not interested in kidnapping Mr. Best or Mr. Lorick.

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(54) 20 N.Y. 2d 266, 282 N.Y.S. 2d 519, 229 N.E. 2d 206 (1967)

(55) Id., 282 N.Y.S. 2d at 521, 229 N.E. 2d at 208

(56) Supra, n. 50

Their sole purpose was to obtain the liquor from the truck those men were driving. In the process, and incidental to that purpose, Mr. Best and Mr. Lorrick were driven from New Jersey and R Streets N.W., Washington, D.C. to the nearby suburb of New Carlton, Maryland. In the course of this short distance, a state line was crossed, and at that point there was a technical violation of the Federal Kidnapping Act. It was because of this movement that the Government was able to invoke the Act, and thereby subject the appellant to a possible sentence of imprisonment for life while the maximum sentence for robbery is imprisonment for 15 years. This is precisely the type of situation which has been condemned by the forward looking courts and authorities referred to herein. There is no good reason why this Court should allow this unfair and untenable practice to continue to work its mischief in this jurisdiction.

CONCLUSION

WHEREFORE, it is respectfully submitted that the trial court's denial of the appellant's motions for a mistrial and to suppress the in-court identification should be reversed and that the case be remanded for a new hearing and trial, and that the convictions

for kidnapping be reversed as a matter of law.

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SUPPLEMENTARY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

NO. 23949

UNITED STATES OF AMERICA, APPELLEE

V.

ALPHONSO CAIN, APPELLANT

APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF COLUMBIA

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23,949

UNITED STATES OF AMERICA, APPELLEE

V.

ALPHONSO CAIN, APPELLANT

SUPPLEMENTARY BRIEF FOR APPELLANT

ISSUES PRESENTED

1) Is there clear and convincing evidence of an independent source where the Government's sole identification witness contradicts and recontradicts himself on numerous occasions, in addition to other evidence indicating a lack of independent source?

2) Is it a violation of a suspect's constitutional rights to counsel and equal protection to not be permited representation at a pre-custodial photo display when under the same circumstances a suspect appearing in a pre-custodial line-up is entitled to representation?

REFERENCES TO PARTIES AND RULINGS

The ruling which is the prime basis for this supplementary brief is Judge John Lewis Smith, Jr.'s finding that there was an independent source for the in-court identification. This finding was made on June 10, 1971, and can be found in the transcript of the remand hearing of that date on pp 46-49. His basis for the ruling was in large part two portions of the transcript from the original identification hearing which he read into the transcript of the remand hearing and can be found at pages 47-49 thereof.

ARGUMENT

I. THE TRIAL COURT'S FINDING OF AN INDEPENDENT SOURCE IS CONTRARY TO THE EVIDENCE.

(Pertinent parts of transcript of remand hearing: 12-21, 26-28, 31-36, 6-49)

One of the purposes of the remand hearing, ordered by this Court on April 27, 1971, was to see if any of the evidence elicited during the hearing would call for a different ruling on independent source.

The appellant has already presented to this Court in his original brief a number of factors which belie a finding that there was an independent source for Mr. Best's in-court identification. The remand hearing provided one more strong factor -- the lack of credibility of Mr. Best, the Government's only identification witness. 1/

It is quite apparent from the evidence elicited at the remand hearing that Mr. Best could not have been shown a photograph of the appellant on December 31, 1968. 2/ However, on March 18, 1969,

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1/ Brief for Appellant, pp 12-13. These factors were also argued briefly by Counsel at the remand hearing. Tr. 41-43 (Transcript references are to the transcript of the remand hearing unless otherwise stated).

2/ TR. 26-28, 31-32, 33-36

at the preliminary hearing where a good strong identification by him would further the prosecution, he testified that he saw appellant's photo on two occasions, including December 31, 1968. 3/ At the first hearing of the identification issue on November 3, 1969, where testimony from him that he saw appellant's picture prior to the time the police officer was prepared to testify he first showed the picture to him would have demolished the prosecution, he testified that he didn't see the picture until January 1, 1969. 4/ At trial before a jury, where again a good strong identification would appear to be helpful, he testified he saw the picture on two occasions including December 31, 1968. 5/ Prior to the remand hearing on June 10, 1971, he discussed the case with an Assistant United States Attorney who read his previous testimony to him. 6/ At the hearing, he again changed his testimony to only that which would be in accordance with the testimony of the police officers who were also to testify, namely that he was not shown the photo until January 1, 1969, and he then proceeded to deny his previous

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3/ Tr. 14-16

4/ Brief for Appellant, pp 9-10

5/ Tr. 12-13

6/ Tr. 20-21

inconsistent testimony, 7/ notwithstanding that it was read to him in open-court. 8/

Additionally, Mr. Best testified at the remand hearing that he was exactly 5'8" tall 9/ and that if he saw somebody taller than he, he would know the man was taller. 10/ However, when questioned about the robber; whom Mr. Best described to the police as 5'8"-5'9" tall, 11/ the appellant being 6 ft.; 12/ Mr. Best began to hedge, and stated that the robber might have been 5'9" - 5'10" and then said he might even have been 5'11". 13/

The appellant submits that the willingness of Mr. Best to say whatever he believed would help convict the appellant is amply demonstrated. Together with the other evidence it seems apparent that there was an absence of that "clear and convincing evidence" needed to prove an independent source. 14/

7/ Tr. 14, 16-17

8/ Tr. 12-13, 14-16

9/ Tr. 12

10/ Tr. 17

11/ Brief for Appellant, P. 13

12/ Ibid

13/ Tr. 18-19

14/ U. S. v. Wade (1967) 388 U.S. 218. Cont'd

"Clear and convincing" has been defined as ".... so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind.." In re Jost (1953) 117 Cal. App. 2d 379, 383, 256 P. 2d 71, 74.

In making its finding, the trial court interpreted Mr. Best's facility for changing his testimony as confusion. 15/ But nowhere in the transcript did Mr. Best plead confusion. As already pointed out, when faced with his prior inconsistent testimony, he simply denied having so testified. Furthermore, whenever Mr. Best was asked as to when he first saw the photo, he always had a ready answer and never indicated any confusion or inability to recall.

The trial court also relied heavily on portions of the trial transcript for finding there was an independent source. 16/ Part of it was Mr. Best's statement that when he saw the appellant's photo, he said, " .... that's the one right there". 17/ But the trial court ignored the apparently very objective testimony of the police officer who showed the picture to Mr. Best that Mr. Best had merely told him of the photo "strongly resembled" the robber. 18/ The remaining portion of the piece of transcript relied upon primarily consists of leading questions of the prosecutor and the

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15/ Tr. 46

16/ Tr. 47-49

17/ Tr. 47-48

18/ Brief for Appellant, P. 12

less than surprising responses to the effect that there certainly was an independent source. One of the few proper questions, "now, what is the basis for your identification in Court today?", drew the response, "his mustache and I would say his haircut was about the same." 19/ The Appellant submits that the Government failed to provide evidence of an independent source that is clear and convincing.

II. THE APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL AT THE PHOTO IDENTIFICATION.

(Pertinent parts of transcript of Remand Hearing: 28-31)

Because of the issue of independent source is directly related to the question of the appellant's right to have counsel present at the photographic display on January 1, 1969, 20/ and because of the recent decision of Wise v. Murphy, 21/ the appellant wishes to add to his arguments previously presented to this Court, in his brief 22/ and in oral argument, the following points.

19/ Tr. 49

20/ United States v. Wade (1967) 388 U.S. 218 at pp 239-242

21/ (1971), D.C. App) 275 A.2d 205

22/ Appellant's Brief, pp. 16-19

23/ Wise v. Murphy (1971, D.C. App.) 275 A. 2d 205 at P. 207

24/ Set forth in brief in Wise v. Murphy, supra, at P. 207

25/ See Simmons v. United States (1968) 390 U.S. 377; U. S. v. Zeiler (1970 3rd Cir.); 427 F. 2d 1305; Thompson v. State (1969) _____ nev. _____ 451 P. 2d 704, cert. denied 396 U.S. 893

In Wise, the police had focused their investigation on a suspect who was ordered to appear in a pre-custodial line-up to be viewed by the complainant. The District of Columbia Court of Appeals, in reviewing the propriety of such procedure upheld it, noting that all the constitutional safeguards were to be utilized, citing United States v. Wade (1967) 388 U.S. 218.[23] Among the many safeguards,[24] was the appointment of counsel to represent the suspect.

Recognizing that photo displays are equally, if not more, fraught with danger and equally critical as line-ups, many courts have applied the same legal standards to both types of identification procedures.[25]

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23 Wise v. Murphy(1971, D.C. App.) 275 A.2d 205 at P. 207

24 Set forth in brief in Wise v. Murphy, supra, at P. 207

25 See Simmons v. United States (1968) 390 U.S. 377; United States v. Zeiler (1970 3rd Cir.); 427 F.2d 1305; Thompson v. State (1969) _____Nev._____ 451 P. 2d 704, cert. denied 396 U.S. 893

No case could be found holding that photo displays are less conducive to mis-identification than line-ups, less dangerous, and therefore less needful of constitutional safeguards.

In Wise 26/, the District of Columbia Court of Appeals saw fit to apply Wade 27/ to a pre-custodial line-up where the investigation had focused on the appellant therein, and required the presence of counsel.

Likewise, in this case the police had focused their investigation on the appellant, Mr. Cain 28/. Therefore, he was entitled to presence of counsel at the photo display.

Such a holding may well be somewhat unique, but the District of Columbia Court of Appeals has already set the standard in this area of the law. To adhere to that standard in a line-up situation, but not in an equally critical and dangerous photo display situation, would not only be illogical but would also constitute a denial of the equal protection of the law guaranteed by the Constitution.

As a final practical consideration, the Public Defender Service now has attorneys provide substitute representation at line-ups, presentments and other emergency functions. There is no reason why they could not be similarly deployed to cover photo identification of suspects on whom police investigations have focused.

26/ Supra, n: 4

27/ Supra, n: 1

28/ Tr. 28-31

CONCLUSION

WHEREFORE, it is respectfully requested that the finding of independent source and the judgment of conviction be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief were hand-delivered this ____day of August, 1971, to the Office of the United States Attorney, United States Courthouse, Washington, D. C. 20001.

Robert T. Gaston

ROBERT T. GASTON

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23945

UNITED STATES OF AMERICA, APPELLEE

v.

ALPHONSO CAIN, APPELLANT

Appeal from the United States District Court for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney

JOHN A. TERRY,
DAVID C. WOLL,
PHILIP L. COHAN,
Assistant United States Attorneys

Cr. No. 577-69

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TABLE OF CASES

Cases—Continued

OTHER REFERENCES

* Cases and authorities chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether the trial court properly denied appellant's motion for a mistrial? *I.e.*,

(a) Whether appellant met his burden of showing an unnecessarily suggestive identification procedure?

(b) Whether the complaining witness' in-court identification was based upon an independent source?

2. Whether the trial court properly denied appellant's motion to suppress the in-court identification testimony?

3. Whether the trial court properly denied appellant's motion for judgment of acquittal on the kidnapping counts?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,949

UNITED STATES OF AMERICA, APPELLEE

v.

ALPHONSO CAIN, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a seven-count indictment filed April 21, 1969, appellant was charged with robbery,[1] two counts of assault with a dangerous weapon,[2] unauthorized use of a vehicle,[3] two counts of kidnapping,[4] and interstate transportation of a stolen motor vehicle.[5] Trial was held on November

[1] 22 D.C. Code § 2901.

[2] 22 D.C. Code § 502.

[3] 22 D.C. Code § 2204.

[4] 18 U.S.C. § 1201.

[5] 18 U.S.C. § 2312.

3 and 4, 1969, before the Honorable John Lewis Smith, Jr., sitting with a jury, and appellant was found guilty on all seven counts. On January 16, 1970, appellant was sentenced to imprisonment for four to twelve years for robbery, three to ten years for each count of assault with a dangerous weapon, one to three years for unauthorized use of a vehicle, four to twelve years for each count of kidnapping, and one to three years for interstate transportation of a stolen motor vehicle, all sentences to run concurrently. This appeal followed.

Pre-Trial Hearing

At the pre-trial identification hearing Clarence M. Best testified that on December 31, 1968, he was employed by Globe Distributing Company as a driver's assistant and on that day was working on a delivery truck. At approximately 11:00 a.m., while Best and the driver (Henry F. Lorick) were delivering some whiskey, two men armed with guns entered the truck as it was stopped at a red light at the intersection of R Street and New Jersey Avenue, Northwest (Tr. 11-12). One of the men drove the truck to the vicinity of the Washington Coliseum, where Best and Lorick were then put into the back of the truck. Approximately thirty to forty minutes later the truck was stopped, and, after another ten- to fifteen-minute wait, the doors were opened. Another truck had been backed up against the back of the Globe truck, and the first two men, joined now by appellant (Tr. 13), entered the back of the Globe truck and made Best and Lorick unload the whiskey into the other truck. Appellant and the first two men also helped. Although there was no artificial lighting in the back of the Globe truck, the working area was lit by the daylight which came in through the space remaining between the back ends of the two trucks (Tr. 14). The unloading took approximately ten to fifteen minutes, during which time Best was observing appellant's face (Tr. 20). Based on his observations on December 31, Best testified that appel-

lant was the third man of the three who robbed the Globe truck. Best further testified to having seen appellant again at a preliminary hearing before the United States Commissioner on March 16, 1969. Appellant was seen sitting "on the regular court seats" together with his lawyer, in the midst of about twenty-five or thirty people (Tr. 5-6).

On January 1 or January 2, 1969, Best was shown approximately twenty to twenty-five photographs ("It could have been 20 or 25; somewhere in the neighborhood") at his home by Detective Frederick A. Cain and another detective, and from these photographs he identified appellant as one of the men who robbed the Globe truck on December 31 (Tr. 7-8). Best stated that he viewed approximately twelve to thirteen photographs over about a five-minute period before picking out appellant's photograph (Defendant's Exhibit 1-D), stating, "This picture" (Tr. 11). He was not told that a picture of one of the robbers was among the photographs shown to him, and no encouragement was given him to select appellant's photograph (Tr. 8-9, 11). Of the seven photographs marked for identification as Defendant's Exhibits 1-A through 1-G, Best could recall only five as being among the group of photographs originally viewed, and he "thought" there had been more (Tr. 10).

Approximately one week after first identifying appellant's photograph, Best was again shown that photograph while at work, this time in the presence of Henry Lorick, the driver of the Globe truck. Although Lorick was unable to identify any of the photographs, Best again identified the photograph of appellant (Tr. 15-16). He testified that he was shown "between 15 and 20 [photographs]. somewhere around there" at this second viewing, which included the photographs seen before, together with some additional photographs.

Best also testified that he had described appellant[*] as "slim, about 145 or 150 pounds, medium brown . . . I

[*] He also gave descriptions of the other robbers (Tr. 18-19).

guess around 5'8", 5'9", somewhere around there . . . thin mustache" (Tr. 18-19). In contrast, appellant testified that on December 31, 1968, he was 6'0" and about 170 to 178 pounds.

After stipulating that Mr. Lorick was unable to identify appellant either by person or by photograph, the Government called Detective Frederick A. Cain. Detective Cain testified to having assembled a group of seven photographs (Defendant's Exhibits 1-A through 1-G), including one of appellant, and showing this group to Best on January 1 (Tr. 26). Subsequently, additional photographs were added to this group and shown again to Best while at work. On both occasions he identified appellant.

The Trial

After substantially repeating his earlier testimony concerning the robbery (Tr. 37-46) and making an in-court identification of appellant (Tr. 45), Best went on to give a description of the truck used by appellant (Tr. 43-44). He stated that after the whiskey had been removed from the Globe truck, he and Lorick were again placed in the back of that truck and driven for about an hour to New Carrolton, Maryland (Tr. 48), where the back door to the truck was unlocked. They were instructed to remain inside for five minutes.

Best testified that later on the same date, December 31, 1968, he was shown books of photographs at police headquarters and there identified a picture of appellant (Tr. 51-52). Subsequently, he was shown a different set of photographs at his home by Detective Cain and there again identified a picture of appellant. Best's testimony on this particular point, however, is not entirely clear:

> Q. Were you able to see the person that you now identify in these pitcures at that time?
>
> A. Yes, I saw one photo of him, yes.
>
> Q. I am speaking now of the time you were at Police Headquarters on that particular day?

A. Yes.
Q. Well, did there come a time that the police showed you some more pictures?
A. Yes, they showed me some more.
Q. Where was that?
A. At my house.
Q. Now, who showed these pictures, do you recall?
A. Detective Cain.
Q. Were these pictures of different subjects?
A. Yes, they was.
Q. At this time were you able to identify anyone as one of these hijackers?
A. Yes; I identified one picture.
Q. That was the same person you identified in court today?
A. Yes, it is.
Q. *Was that the first time that you made a photo identification of this defendant?*
A. *Yes.*
Q. This was at your home?
A. Right. (Tr. 52-53) (emphasis added).

This confusion was furthered upon cross-examination when Best was asked, "When was the first time that you saw a picture of this defendant, Mr. Best? Was that at the police station or at your home?", and his answer, "Both places," was not pursued (Tr. 56). Best then testified that approximately one week later, while at work, he was again shown photographs and again identified a photograph of appellant (Tr. 53).

In making an in-court identification of appellant, Best stated that his identification was based on appellant's facial features as he remembered them from the date of the hijacking and that he was positive of his identification of appellant (Tr. 53, 58).

Henry Lorick next took the stand, and his testimony as to events on December 31, 1968, was substantially identical to the testimony of Mr. Best. However, unlike Best, he was not able to make an identification of appellant or his associates and could not describe the truck em-

ployed by appellant and his two cohorts to receive the whiskey (Tr. 62-63, 64). Lorick explained his inability to identify any of the robbers by stating that he was frightened and "was only interested in getting them off my truck" (Tr. 65-66).

Officer Delbert G. Metz of the Metropolitan Police testified that at approximately 2:30 p.m. on December 31, 1968, he received a report of a hijacking from two men, one of whom, the complainant, identified himself as Henry F. Lorick. Officer Metz's report of the offense (Government's Exhibit 5) included a description of the truck used by the hijackers as being "a van-type truck with Ohio tags, with the numbers TT-9980A stenciled in white on the rear bumper" (Tr. 70).

Lyle Gatske testified that he operates a Texaco service station on St. Barnabas Road in Oxon Hill, Maryland, and there rents out U-haul trucks. Gatske identified Government's Exhibit 6 as a truck rental contract dated December 31, 1968, under which a twelve-foot van truck bearing Ohio license plate number 74824 and identifying number TT-9980A was rented by him to someone named Alphonso Cain (Tr. 74-75). Appellant stipulated that his signature appeared on that contract (Tr. 80). The truck was due back at 6:00 p.m. on December 31 but was not returned. Gatske recovered the truck from the Eleventh Precinct on January 1 or 2.

Detective Cain next testified that he was assigned to investigate a reported hijacking and that in furtherance of that investigation he interviewed Mr. Gatske at the latter's service station. From Mr. Gatske he obtained the name of appellant as the man who rented the truck claimed to have been involved in the hijacking (Tr. 96). Thereafter Detective Cain obtained a photograph of appellant, together with six other photographs which were selected because of their similarity to appellant's photograph, and showed them all to Best on January 1, 1969 (Tr. 96-97). The balance of Detective Cain's testimony was the same as that given at the pre-trial hearing.

Appellant presented no evidence.

ARGUMENT

I. The trial court properly denied appellant's motion for a mistrial.

(Tr. 6, 18-19, 22, 49-58, 62-63, 68-72, 86-87, 95-97)

Appellant's first argument is that allegedly inconsistent testimony from Mr. Best rendered "worthless" his prior testimony at the pre-trial identification hearing and, accordingly, required the trial court to grant appellant's motion for a mistrial. In so arguing appellant completely disregards both the fact that there was no evidence of any improper pre-trial identification and the fact that the trial court found an independent source for the in-court identification testimony.

A. *Appellant failed to establish that there had been an unnecessarily suggestive pre-trial identification.*

Appellee maintains that Best did not contradict his pre-trial testimony, but that even if he did, this would not require the granting of a mistrial. It is certainly true that the trial testimony of Best, as it appears in the record, is confusing. First of all, there is testimony that soon after the hijackers made their getaway, Best went to No. 2 Precinct (Tr. 49) to report the incident. He then testified that when present at "Police Headquarters" he "went through the books" and there saw and identified a photograph of appellant. However, on the very same page of the record (Tr. 52) he stated that his first photographic identification of appellant occurred at his home when Detective Cain showed him some photographs. At this point the apparent discrepancy in Best's testimony appeared to have been cured by the prosecutor. However, moments later, upon cross-examination, Best stated that he first saw a picture of appellant at "both places" (Tr. 56), meaning both the police station and his home. On redirect examination the prosecutor abandoned what appears from the record to have been a hopelessly confused line of questioning and proceeded to reaffirm the inde-

pendent source for Best's in-court identification (Tr. 58). Appellant's counsel[7] made no motion at this time.

However, prior to the resumption of testimony on the next morning, counsel moved for a mistrial, arguing essentially the same points as now appear in appellant's brief. Presumably, in denying this motion the trial court did not share appellant's view that the confusion apparent from Best's testimony warranted a mistrial. Moreover, since the court had previously found that Best's in-court identification of appellant arose from observations made during the perpetration of the offense, the allegedly inconsistent testimony respecting the photographic identification did not require a mistrial. Even had appellant requested the court to order a further hearing outside the presence of the jury to explore the alleged inconsistency,[8] the court could properly have refused to do so since there had been clear and convincing evidence of an independent basis for Best's in-court identification (see part B, *infra*).

Moreover, at this stage of the proceedings, with the record quite apparently in a confused state, it was incumbent upon appellant, as the moving party, to establish that Best had in fact been shown photographs on December 31[9] and that that "photographic identification

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[7] The same counsel continues to represent him on appeal.

[8] This is the procedure suggested in *Rouse* v. *United States*, 123 U.S. App. D.C. 348, 359 F.2d 1014 (1966), relied upon by appellant, but it was not followed in this case, nor was it ever requested or suggested by appellant at trial.

[9] In addition to the testimony of Best quoted in the counterstatement, *supra*, pp. 4-5, the following testimony elicited at the pre-trial suppression hearing suggests that this witness was confused with respect to any precinct photographic identification:

> Q. After this incident took place, about which you are here today to testify, on December 31, 1968, when was the first time that you saw the defendant after that?
>
> A. In person or otherwise?
>
> Q. In person?
>
> A. At the Commissioner's hearing. (Tr. 5)
>
> * * * *

[Footnote continued on page 9]

procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U.S. 377, 384 (1968). Appellant did not in any way pursue the question of suggestivity and thus failed to meet this

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[9] [Continued]

Q. When did you see him by photograph?
A. Somewhere around the Second of January—First or Second of January.
Q. Where was it that you viewed the photograph?
A. At my house.

* * * *

Q. How many times were you shown this photograph?
A. Twice.
Q. When was the second time?
A. About a week later at the Globe Distributing Company (Tr. 15).

* * * *

Q. After this incident occurred on December 31, how soon did you contact the police?
A. That evening, I guess around between 2:30 and 3:00—2:00 or 2:30, I would say.
Q. Did you give a description to the police of the man who robbed you at that time?
A. Yes; we gave them the best one we could.
Q. Do you recall what you stated?
A. I told them one guy was slim, about 145 or 150 pounds, medium brown.
Q. Did you give his height?
A. I guess around 5'8", 5'9", somewhere around there.
Q. Was that the only description that you gave of that particular person?
A. The other one—
Q. Of that particular person, did you give any other details as to clothing or something like that?
A. No.
Q. So, that was the extent of your identification of one of those persons?
A. Yes. (Tr. 17-18.)

* * * *

Q. You have given here today two descriptions, one of which is applicable to the defendant. Which one is that?
A. The first one.
Q. Where you stated he was 5'8" or 5'9" and weighed 145 to 150 and was medium brown?
A. (Nodded in the affirmative) (Tr. 19).

burden.[10] Appellant certainly had the opportunity to inquire into the circumstances of the precinct identification and to bring out any facts bearing on a suggestive procedure,[11] and his decision not to pursue this avenue to discredit the Government's evidence should foreclose any attempt to do so now on appeal.

Appellee further submits that even if Best did review books of photographs on December 31, 1968, the procedure then employed could not have been unnecessarily suggestive because the police had not yet determined the hijackers' identity. Officer Metz testified that he received a report of a hijacking from two men on December 31, the complainant being named as Henry F. Lorick (Tr. 68-69), which included a description of a van-type truck used in the hijacking, and which he turned over to a detective in the Robbery Squad (Tr. 72). Detective Cain testified that he was assigned to investigate a reported hijacking alleged to have occurred on December 31, 1968, and that on January 1, 1969, his investigation took him to a Texaco station because "information was developed by the detectives that responded to the initial call, that the truck that was used to transport the liquor was rented from a Texaco station at St. Barnabas Road, Prince Georges County" (Tr. 95). This investigation determined that the truck had been rented to a man named Alphonso Cain. Thereafter Detective Cain acquired a photograph

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[10] It is not until *after* a defendant has established that the identification procedure was unnecessarily suggestive that "the burden shifts to the Government to show by clear and convincing evidence that an in-court identification was the product of an independent source untainted by the invalid confrontation." *Clemons* v. *United States*, 133 U.S. App. D.C. 27, 50, 408 F.2d 1230, 1253 (1968) (*en banc*) (opinion of Wright, J.), *cert. denied*, 394 U.S. 964 (1969).

[11] The only testimony respecting this procedure merely states that Best was shown "a lot" (Tr. 52) of pictures in "books" (Tr. 52). However, that testimony is sufficient to eliminate the typical charges of unnecessarily suggestive identification procedures, for the clear indication that Best reviewed "books" is, we submit, favorably probative of the absence of any focus of attention on appellant's picture.

of appellant and showed it, together with six similar photographs, to Best on January 1. In view of this chain of investigatory activities, it is apparent that prior to January 1 the police had no reason to suspect that appellant was one of the hijackers. Accordingly, even if Best did view photographs on December 31 and did identify appellant from those photographs, no one could have had reason to encourage an identification of appellant because he was not yet a suspect.

B. ***There was, in any event, an independent source for the in-court identification so that any error which might have flowed from the introduction of evidence of the December 31 pre-trial identification was harmless beyond a reasonable doubt.***

Appellant sought to suppress Best's in-court identification on the ground that there was no independent source for that identification. He contends here, as he did in the trial court, that the absence of independent source is evidenced either by Best's poor opportunity to observe the hijackers or the employment of an unnecessarily suggestive photographic identification procedure which tainted Best's ability subsequently to identify appellant in court. By denying appellant's motion the trial court, to the contrary, found "clear and convincing evidence" that Best's opportunities and ability to observe appellant gave an independent basis to his in-court identification. Notwithstanding that the trial court was never called upon to determine whether there had been an improper photographic identification of appellant at No. 2 Precinct on the date of the offense,[12] its finding of independent source remains controlling and permits Best's in-court identification. *See United States* v. *Green*, D.C. Cir. No. 22,710, decided November 12, 1970; *United States* v. *Sera-Leyva*, D.C. Cir. No. 23,630, decided August 28, 1970; *United States* v. *Kemper*, D.C. Cir. No. 22,558, decided July 10, 1970.

[12] See note 9, *supra*.

Appellee submits that clear and convincing evidence of an independent source was abundant. Mr. Best testified that he had an excellent opportunity to observe appellant's features during the span of approximately ten to fifteen minutes during which the whiskey was loaded onto the hijackers' truck, and that the lighting conditions did not impair his observations. Moreover, this testimony was in no way refuted. To the contrary, the main thrust of appellant's challenge to the trial court's finding of independent source is contained in his assertion that if Lorick could not identify appellant, having had the identical opportunity, then that opportunity could not, *a fortiori*, constitute an independent source for Best's identification. This reasoning is unsound, for it disregards the clear evidence that Lorick did not share either Best's ability or his inclination to observe. Not only was Lorick unable to recall the appearance of appellant, but he was equally unable to recall the appearance of the other two hijackers and could not in any way describe the truck which they used. By comparison, Best gave descriptions of all three hijackers and not only recalled the description of the truck but also remembered its serial number. Moreover, Lorick at no time related his inability to identify appellant to any lack of opportunity to observe or lack of good lighting, but rather admitted being frightened and primarily concerned with getting free of the hijackers (Tr. 62-63).

Appellant further suggests that the Government failed to establish an independent source for Best's in-court identification by emphasizing the discrepancy between Best's description of appellant as being "slim, about 145 or 150 pounds, medium brown [skinned] . . . I guess around 5'8", 5'9", somewhere around there . . . thin mustache" (Tr. 18-19), whereas appellant testified that he was 6'0" and weighed about 170 to 178 prounds (Tr. 22). If these comparative figures are viewed most favorably to the Government, the difference appears to be only three inches and twenty pounds. More significantly, Best's testimony clearly indicates that he was only estimating

these figures, and the close correlation between Best's description and appellant's testimony of his weight and height on the date of this incident renders the small actual difference of little magnitude. *United States* v. *Kemper*, *supra*, slip op. at 10; *cf. Brown* v. *United States*, 125 U.S. App. D.C. 43, 365 F.2d 976 (1966). *Compare McRae* v. *United States*, 137 U.S. App. D.C. 80, 88, 420 F.2d 1283, 1291 (1969). In any event, this alleged disparity was ably argued to the trial court which, it is well settled, is in a far better position than the appellate court to weigh its value. *Cf. United States* v. *Skinner*, —— U.S. App. D.C. ——, 425 F.2d 552 (1970). Accordingly, the court's finding of independent source clearly indicates that the discrepancy was not so significant as to persuade that court that an independent source was lacking, and such finding can be reversed only if "clearly erroneous." *(Anthony) Long* v. *United States*, —— U.S. App. D.C. ——, 424 F.2d 799 (1969); *cf. Jackson* v. *United States*, 122 U.S. App. D.C. 324, 326-327, 353 F.2d 862, 864-865 (1965). The record clearly indicates that the trial court's analysis was not erroneous but, to the contrary, was directly in keeping with the dictates of *United States* v. *Wade*, 388 U.S. 218, 240 (1967); *Stovall* v. *Denno*, 388 U.S. 293, 302 (1967); and *Clemons* v. *United States*, *supra* note 10, 133 U.S. App. D.C. at 36. 408 F.2d at 1239.

The court examined all the facets of possible suggestivity which might have violated the rules set forth in *Simmons* and *Stovall*, *supra*, and found no such violation. Admittedly, the court did not explicitly consider the possibility of suggestive identification procedure on December 31 when it made its initial ruling on independent source. However, it did at the time of this ruling have the benefit of Best's testimony denying that his in-court identification was based on prior photographic identifications (Tr. 11) and his further affirmative testimony that his in-court identification was based upon appellant's facial features observed at the time of the offense (Tr. 20-21). Moreover, the trial court is in the more advantageous

position to make this determination, for it is able to observe the demeanor of the witnesses and weigh the evidence as it is presented. It was the court's function to determine whether there was an independent source for the in-court identification, and its finding was consistent with the evidence. *Cf. United States* v. *McNeil*, D.C. Cir. No. 22,360, decided October 31, 1969, slip op. at 6. In seeking to have this finding reversed appellant must shoulder a heavy burden. *United States* v. *(Clinton) Long*, —— U.S. App. D.C. ——, 422 F.2d 712, 715 (1970); *see (Anthony) Long* v. *United States, supra; Clemons* v. *United States, supra* note 10, 133 U.S. App. D.C. at 34, 408 F.2d at 1237. He has not succeeded in doing so.

Appellant also argues that once Best had identified appellant prior to testifying about the precinct identification, then appellant's "only effective recourse" (Br. 11) was a mistrial. Surely this cannot be so, even assuming there was such an identification, if (a) the procedure employed was proper, or (b) the in-court identification was based upon an independent source and the error, if any, in admitting Best's testimony regarding the pretrial identification was harmless.[13] We suggest that appellant is actually arguing that the trial court should have declared that the exclusionary rule of *Gilbert* v. *California*, 388 U.S. 263 (1967), precluded admission of Best's identification testimony. Appellee maintains, however, that this argument would be without merit because there had been no prior exclusion of that evidence by the trial court,[14] and further, because any error which

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[13] *Chapman* v. *California*, 386 U.S. 18 (1967). *See also Clemons* v. *United States, supra* note 10, 133 U.S. App. D.C. at 50, 408 F.2d at 1253 (opinion of Wright, J.).

[14] We submit that the record is adequate for this Court to find that the alleged identification on December 31, 1968, was not impermissibly suggestive. We refer the Court to the testimony of Best respecting that procedure (Tr. 51-52) and the testimony of police officers Metz (Tr. 68-72) and Cain (Tr. 95-97) respecting their investigation and how it came to focus on appellant. *See Hawkins* v. *United States*, 137 U.S. App. D.C. 103, 420 F.2d 1306 (1969).

might have flowed from Best's confusing testimony as to when he first identified appellant was harmless beyond a reasonable doubt. Appellee finds support for this contention in (1) the clear and convincing evidence of independent source, (2) the two other proper photographic identifications, (3) the identification at the Commissioner's hearing, (4) the positiveness of the in-court identification, and (5) the strong circumstantial evidence of appellant's participation in the offense arising from his renting of the U-haul truck.

Accordingly, even if this Court assumes that there was an improper pre-trial identification, inasmuch as the evidence of independent source supports the trial court's admission of the in-court identification, and the evidence of proper identification procedure for the photographic identifications on January 1 and one week thereafter supports the admission of those identifications, any error which might have flowed from Best's testimony regarding the allegedly improper identification was harmless beyond a reasonable doubt. It did not require a mistrial then, nor does it support a reversal now.

II. The trial court properly denied appellant's motion to suppress the in-court identification testimony.

(Tr. 8-9, 26)

Appellant's second argument is that his motion to suppress Best's in-court identification should have been granted because of the Government's alleged failure to produce all of the photographs shown to Best in connection with his identification of appellant. This argument lacks merit for two reasons: (1) there was disputable testimony as to how many photographs Best was shown and no evidence that the Government had knowingly failed to comply with the production order, and (2) even if the Government had failed to comply, the relief sought by appellant would not be the appropriate sanction.

Appellant emphasizes that Best testified to having been shown twenty to twenty-five photographs by Detective

Cain on January 1 (Tr. 8) but that the Government produced only seven photographs at the hearing. Certainly appellant is correct in arguing that the credibility of these two Government witnesses was weakened by this inconsistency; however, this argument cannot rise to the height of a proven fact that the Government failed to comply with the court's order. To the contrary, Detective Cain testified that only seven photographs were shown to Best and that these seven photographs were produced (Defendant's Exhibits 1-A through 1-G) (Tr. 9). Best's statement that he was shown twenty to twenty-five photographs might certainly cast some doubt upon his recollection of this photographic identification, but such testimony does not suffice to prove that the Government disregarded or failed to comply with the court's production order. Absent a showing that the Government "failed to comply," appellant has failed to establish the prerequisite to his request for relief, for Rule 16 (g), FED. R. CRIM. P., provides in part:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has *failed to comply* with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed or it may enter such order as it deems just under the circumstances. [Emphasis added.]

Moreover, the relief requested by appellant was inappropriate. Notwithstanding the omnibus sanction provision which concludes the rule ("such other order as [the court] deems just under the circumstances"), the specified sanctions which precede that provision make it clear that the rule is designed to enable the moving party to obtain his requested discovery. Appellant, however, made no effort to seek a further order of production or otherwise compel the compliance by the Government which

he asserted had not been forthcoming. Accordingly, it seems evident that appellant either was unconvinced that the Government had additional photographs or unconvinced that such other photographs would enhance the merits of his motion. Whatever may have been in his mind, it is clear that he made no further effort to obtain the photographs. Under these circumstances appellee submits that suppression of the in-court identification would not be "such other order as [the court] deems just under the circumstances." [15]

III. The trial court properly denied appellant's motion for judgment of acquittal on the kidnapping counts.

Appellant contends that where a kidnapping offense is merely incidental to another offense, then the kidnapping is not indictable (Br. 21), but he fails to cite any authority in this jurisdiction to support his contention. Appellee, on the other hand, submits that this contention is not the law in this jurisdiction,[16] but that even if it were, the instant kidnappings were not merely incidental to another offense. Appellant has relied upon several cases from California and New York to support his argu-

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[15] Appellant also argues in this section of his brief that his Sixth Amendment right to counsel was violated at the pre-trial photographic identifications. Although the Government has consistently taken the position that there is no right to counsel at such proceedings even when they occur post-custodially (most recently presented to this Court in *United States* v. *Brown*, D.C. Cir. No. 24,452, argued October 23, 1970), we submit that the absence of this right during a pre-custodial photographic viewing is well settled. *Simmons* v. *United States*, *supra*; *United States* v. *Kirby*, —— U.S. App. ——, 427 F.2d 610 (1970).

[16] In *McCollough* v. *United States*, D.C. Cir. No. 22,144, decided May 25, 1970, this Court was presented with a case factually similar to the case at bar. In *McCollough* the appellants had abducted their victim in Maryland and transported him to his place of business in the District of Columbia, where they robbed his safe and were immediately arrested. The victim was under the appellants' control for slightly more than two and one-half hours. Although clearly the asportation in that case was directed solely toward the success of the robbery, this Court sustained convictions of robbery, assault with a dangerous weapon, housebreaking *and* kidnapping.

ment. However, even a cursory reading of these cases discloses their inappositeness to this appeal.[17]

In *People* v. *Daniels*, —— Cal. 2d ——, 459 P.2d 225, 80 Cal. Rptr. 897 (1969) *(in bank)*, the Supreme Court of California indicated quite clearly that the limitations imposed upon the California kidnapping statute would not have applied to the instant case. *Daniels* concerned four separate rape offenses, each involving no greater asportation of the victim than the confines of the victim's home (or in one case the victim's car) would permit. The applicable provision of the California Penal Code, section 209, contained the phrase "kidnaps or carries away," and in construing that phrase the California court overruled prior decisions[18] and held that the legislature meant to exclude from the reach of the statute "not only 'standstill' robberies . . . but also those in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm[19] over and above that necessarily present in the crime of robbery itself." —— Cal. 2d at ——, 459 P.2d at 238, 80 Cal. Rptr. at 910. Accordingly, that court reversed the kidnapping convictions in which the asportation was described as "the brief movements which they compelled their victims to perform . . . solely to facilitate [the crimes of rape and robbery]." *Id.* at ——, 459 P.2d at 232, 80 Cal. Rptr. at 904.

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[17] In addition we note that the statutes involved, CALIF. PENAL CODE §§ 207-210 (West 1970) and N.Y. PENAL LAWS § 135.00, subds. 1. and 2, and § 135.20 (McKinney 1967), are significantly different from 18 U.S.C. § 1201, particularly insofar as both California and New York have enacted kidnapping statutes which establish gradations or degrees of kidnapping and, correspondingly, punishment. In the "Practice Commentary" to Section 135.20, which defines kidnapping in the second degree, an example given of an offense under this section is "confinement of a guard or watchman by violence or threat for a few hours for the purpose of advancing a burglary." N.Y. PENAL LAW § 135.20, *supra*, at 316.

[18] *People* v. *Chessman*, 38 Cal. 2d 166, 238 P.2d 1001 (1951), which had held that it was the fact of asportation, not the distance, which rendered the statute applicable, and *People* v. *Wein*, 50 Cal. 2d 383, 326 P.2d 457 (1958).

[19] See note 21, *infra*.

Although the minute asportation present in *Daniels* is in and of itself sufficient to distinguish that case, the New York opinions relied upon in *Daniels* further reveal that the *Daniels* court's reasoning would not support acquittal in the present case.[20] In *People* v. *Levy*, 15 N.Y. 2d 159, 204 N.E.2d 842, 256 N.Y.S.2d 793 (1965), the defendants entered the victim's car in Manhattan and drove them around for twenty minutes while effecting a robbery, then left the car. In reversing the kidnapping convictions and dismissing those counts of the indictment, the *Levy* court concluded that the asportation there present was an integral part of other crimes of which appellants were convicted and that the legislature did not intend that there be separate indictments for kidnapping under such circumstances. However, the court also gave an example of a case in which separate indictments were appropriate. In *People* v. *Black*, 18 App. Div. 2d 719, 236 N.Y.S.2d 240 (1962), the defendant entered the victim's home, and carried the victim with him when he left. Following a high-speed chase, the defendant crashed his car and was apprehended. In affirming separate convictions of robbery and kidnapping, the *Black* court emphasized that the kidnapping occurred after the robbery and that

> these crimes had no connection with each other except insofar as defendant might have believed that a hostage would give him some insurance against

[20] The Court in *Daniels* commented approvingly on the Model Penal Code kidnapping provisions, § 212.1 (Tentative Draft No. 11, 1960, which was adopted virtually verbatim in the Proposed Official Draft, May 4, 1962). As is the case with the New York and California statutes, the Model Penal Code distinguishes between simple false imprisonment and the more dangerous abductions for felonious purposes (*i.e.*, kidnapping). Kidnapping is defined as the "[unlawful removal of] another from his place of residence or business, or a substantial distance from the vicinity where he is found . . . [for] any of the following purposes . . . (b) to facilitate commission of any felony or flight thereafter . . . ." However, if the victim is released alive, the crime is reduced to a second-degree felony. The *Daniels* court's approval of such a scheme further supports our contention that it would sustain the instant "kidnapping" convictions.

close pursuit. 18 App. Div. 2d at 721, 236 N.Y.S.2d at 243.[21]

We submit that the instant case also concerns separate offenses and is not so factually dissimilar as to justify a different result from that reached in *Black*.

In a more recent decision, *People* v. *Miles*, 23 N.Y.2d 527, 245 N.E.2d 688, 297 N.Y.S.2d 913 (1969), the New York Court of Appeals refused to apply the *Levy* rule where the defendants attempted to kill their victim in New Jersey but, because their efforts aborted, drove into New York in an effort to dispose of his body. The court found that the defendants' purpose in driving into New York was "connected with but not directly instrumental to the attempt to kill [the victim] . . . ." 23 N.Y.2d at 539, 245 N.E. 2d at 921. In distinguishing *Levy* and *People* v. *Lombardi*, 20 N.Y.2d 266, 229 N.E.2d 206, 282 N.Y.S.2d 519 (1967) (involving transportation of drugged girls from Manhattan to a motel in Queens with intent to rape) the court stated:

> The robbery and rapes could not be committed in the forms planned without the limited asportations

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[21] The *Levy* court approvingly cited Note, 110 U. PA. L. REV. 293 (1961), respecting the separation of "essentially separate" crimes from "integral" acts of the same offense. *People* v. *Levy*, 15 N.Y.2d at 160, 204 N.E.2d at 846, 256 N.Y.S.2d at 797. In commenting on the effect upon one who is forcibly transported and restrained, the author of the Note stated:

> When a person is so moved, an aggressive reaction becomes more likely . . . ; movement goads, and each step which takes the victim away from the familiar, away from possible aid, aggravates his retaliatory and freedom-seeking impulses, compounding the danger that serious injury will result. 110 U. PA. L. REV. at 296.

The Note then goes on to say that in determining whether the offense of kidnapping has occurred

> there should be an examination of the facts to determine whether or not the asportation created a risk distinct from that inherent in the crime which the movement accompanied; pertinent considerations should be whether the distance covered was substantial and whether the victim was isolated from the aid of others [citing MODEL PENAL CODE § 212.1, *supra*]. *Id.* at 296-297.

> there involved. Indeed, in any robbery, there is a restraint of "false imprisonment" and in every rape there is a similar restraint and often removal in some limited sense. It is this kind of factual merger with the ultimate crime of the preliminary, preparatory, or concurrent action that the rule is designed to recognize, and thus prevent unnatural elevation of the "true" crime to be charged. It is a merger suggestive of, but not quite like the merger of the preparation and attempt with the consummated crime, a familiar concept in the criminal law.
>
> . . . [T]he *Levy-Lombardi* rule . . . *was not designed to merge "true" kidnappings into other crimes merely because the kidnapping were used to accomplish ultimate crimes of lesser or equal or greater gravity.* Moreover, it is the rare kidnapping that is an end in itself; almost invariably there is another ultimate crime. 23 N.Y.2d at 539-540, 245 N.E.2d at 694, 297 N.Y.S.2d at 922 (emphasis added).

Accordingly, even under the New York or California statutes we submit that the cases cited above would compel affirmance of the instant convictions.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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SUPPLEMENTAL BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,949

UNITED STATES OF AMERICA, Appellee,

v.

ALPHONSO CAIN, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
PHILIP L. COHAN,
JOHN A. McCAHILL,
Assistant United States Attorneys.

Cr. No. 577-69

I N D E X

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED

The issues framed by this Court in its remand order of April 27, 1971, are as follows:

1. Whether the showing of photographs at the precinct station on December 31 was so impermissibly suggestive as to require suppression of any photographic identification testimony?

2. Whether any of the evidence introduced upon that subject at the remand hearing would in any way call for a different ruling on the question of independent source?

UNITED STATES COURT OF APPEALS
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SUPPLEMENTAL BRIEF FOR APPELLEE

SUMMARY OF PROCEEDINGS

This case returns to this Court after a remand. Appellant was convicted of robbery, two counts of assault with a dangerous weapon, unauthorized use of a vehicle, two counts of kidnapping, and interstate transportation of a stolen motor vehicle. He noted this appeal; briefs were filed in due course, and the Court heard oral argument on April 15, 1971. On April 27, 1971, this Court remanded the case to the District Court for a hearing to determine whether the showing of photographs on December 31, 1968, was so impermissibly suggestive as to require suppression of any photographic identification testimony, and whether any of the evidence introduced on that subject would in any way call for a different ruling on the question of independent source.

Pursuant to this Court's remand order, a hearing was held before the Honorable John Lewis Smith, Jr., on June 10, 1971. Clarence Best, the witness whose identification of appellant is

the subject of this appeal, and three members of the Metropolitan Police Department testified that no photograph of appellant was shown at Best on December 31, 1968 (Tr. 11-12, 20, 26-28, 30-32, 35-38).[1/]

At the conclusion of the hearing, Judge Smith ruled that there was no impermissibly suggestive identification and that there was no evidence to justify a different ruling on the question of independent source (Tr. 46-50).

ARGUMENT

I. The showing of photographs at the precinct station on December 31, 1968, was not so impermissibly suggestive as to require suppression of any photographic indentification testimony. (Tr. 11-12, 20, 26-28, 30-32, 35-38)

The testimony at the remand hearing makes it abundantly clear that the showing of photographs to Clarence Best on December 31, 1968, was in no way suggestive. This conclusion is irresistible, since appellant's photograph was not among those shown to Clarence Best on that date. On December 31, 1968, appellant was not a suspect in the case, and the police did not have a photograph of him (Tr. 11-12, 20, 26-28, 30-32, 35-38). Apparently, appellant does not dispute the absence of suggestivity here, since he does not argue the point in the supplemental brief which he has filed. We therefore take the point as conceded.

1/ "Tr." refers to the transcript of the remand hearing on June 10, 1971.

II. There was no evidence introduced at the remand hearing which would call for a different ruling on the question of independent source. (Tr. 46-49)

At the conclusion of the remand hearing, the District Judge found that he had heard no testimony that persuaded him to alter his previous ruling that there was an independent source for Best's in-court identification (Tr. 49). The judge's finding should not be disturbed by this Court. See United States v. York, ____ U.S. App. D.C. ____, 440 F.2d 252 (1971), affirming 321 F. Supp. 539 (D.D.C. 1970). Appellant cannot point to a shred of evidence in the remand hearing which would support a different result on the question of independent source, for indeed there is no such evidence.

Appellant, however, argues that the testimony of Clarence Best was so incredible that the trial judge was required to rule that there was no independent source for Best's in-court identification. The trial court found Best's testimony to be credible and, in doing so, made a specific reference to the unequivocal testimony that the witness had given at the trial (Tr. 47-48). The standard for appellate scrutiny of the credibility of witnesses is well settled. The credibility judgment of the trial court, acting as finder of fact, should be honored by this Court unless it is clearly erroneous. Jackson v. United States, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965); accord, Dillane v. United States,

127 U.S. App. D.C. 377, 384 F.2d 329 (1967).[2/] Appellant's challenge to Best's testimony simply does not meet that standard.

2/ Appellant also argues in his supplemental brief that he was denied his right to counsel at the photographic identification and asserts that this denial violated rights guaranteed to him by the Sixth Amendment. Initially we note that this issue is not within the ambit of this Court's remand order of April 27. Nevertheless, we feel obligated to point out that this and other circuits have consistently declined to recognize the existence of any right to counsel at photograph identifications conducted even after arrest. See, e.g., United States v. Meachum, D.C. Cir. No. 24,109, decided June 8, 1971 (affirmed without opinion); United States v. Brown, D.C. Cir. No. 24,452, decided March 15, 1971 (en banc) (opinions to follow); United States v. Bennett, 409 F.2d 888 (2d Cir.), cert. denied, 396 U.S. 852 (1969); United States v. Collins, 416 F.2d 696 (4th Cir. 1969), cert. denied, 396 U.S. 1025 (1970); United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); Allen v. Rhay, 431 F.2d 1160 (9th Cir. 1970); McGee v. United States, 402 F.2d 434 (10th Cir. 1968), cert. denied, 394 U.S. 908 (1969).

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing Supplemental Brief has been mailed to the attorney for appellant, Robert T. Gaston, Esquire, 806 15th Street, N.W., Washington, D.C., 20005, this 23rd day of September, 1971.

John A. McCahill
JOHN A. McCAHILL
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